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TABLE OF CASES

STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No._____

THE GEM JEWELRY COMPANY, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

The Gem Jewelry Company, Inc., a corporation, organized and operating under the laws of the State of Louisiana, respectfully prays this Court, by certiorari, to review and determine Cause No. 12010 styled The Gem Jewelry Company, Inc., Petitioner, vs. Commissioner of Internal Rev-

enue, Respondent, wherein the Circuit Court of Appeals for the Fifth Circuit at New Orleans has rendered a final judgment affirming a judgment and order of The Tax Court sustaining a deficiency assessment of the Commissioner of Internal Revenue for income and excess profits taxes against the Petitioner for the fiscal year ending July 31, 1941, and amounting to $14,726.91.

I.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

This case involves the scope of review to which a litigant is entitled by the Circuit Court on appeal from a judgment of The Tax Court, and whether a Tax Court decision establishing a deficiency assessment should be sustained where The Tax Court decision is based on the presumption in favor of the Commissioner and disregards uncontroverted and substantial evidence offered by the Petitioner. This case particularly involves the application of the Administrative procedure Act to review of Tax Court decisions, Title 5, Chap. 19, Sec. 1001, et seq. (1009 e, Scope of Review) 5 U.S.C.A., page 339, 1947 Pocket Parts. A brief review of some of the facts will assist in understanding the questions involved.

J. Jacobs and Morris L. Jacobs were brothers operating retail jewelry stores in Beaumont and Port Arthur, Texas, and in 1940 purchased a retail jewelry store in Alexandria, Louisiana, and incorporated said business with one of their employees and operated said retail jewelry store as a corporation. The Tax Court, in its findings of fact, made the following findings (Transcript of Record, page 21):

> "M. L. Jacobs and J. Jacobs are men of long experience in the purchasing, assembling and mounting of dia-

monds and M. L. Jacobs has had about thirty-six years experience in the jewelry business.

During the taxable year they made a trip together to Cuba; J. Jacobs made a second trip to Cuba; and M. L. Jacobs made a second trip to Mexico to buy diamonds. These diamonds were bought for the partnership and some of them were in turn delivered to petitioner corporation 'at cost.' The president and vice-president made two trips to the eastern markets at no expense to the corporation. Each of the brothers averaged one trip per month to Alexandria for which no charge was made to the corporation and in addition thereto frequent telephone calls were made between Alexandria and Port Arthur, and Beaumont, the exact numbers of which are set forth in the stipulation to which reference is made.

The president and vice-president extended their personal credit for the benefit of petitioner corporation and the corporation procured the benefit of the wholesale purchases made for petitioner and the two partnership stores."

The uncontradicted testimony (Transcript of Record, pages 57 and 58) further showed that the former owner of said business during his last year of operations, in 1939, did a gross business of $30,603.85 and showed a net loss of $330.19, and of course paid no income tax on the operations of said business. The petitioner, during its first fiscal year, being the year in question, starting August 1, 1940, and ending July 31, 1941, did a gross business of $194,503.59 and made a gross profit of $106,833.37 and a net profit after deducting all expenses including salaries allowed by petitioner to its officers of $18,623.19 and paid tax thereon. The following statement shows the amount deducted by the petitioner as salaries for the president and vice-president and the amounts disallowed and the amount allowed by the Commissioner:

OFFICER	SALARY DEDUCTED	DISALLOWED	ALLOWED
M. L. Jacobs, president	$12,000.00	$7,200.00	$4,800.00
J. Jacobs, Vice-President	12,000.00	9,400.00	2,600.00

The Tax Court further found that:

> "On August 15, 1940, the stockholders meeting authorized the acceptance from M. L. Jacobs and J. Jacobs of a contribution to capital of $30,000.00, representing the value of merchandise sold and delivered to petitioner by M. L. Jacobs and J. Jacobs. On July 31, 1941, an entry to this effect as of August 1, 1940, was made on petitioner's books by its certified public accountant.
>
> The income tax return for the fiscal year ended July 31, 1940, was filed on March 13, 1941, and did not reflect this contribution to paid-in surplus." (Findings of Fact of Tax Court, page 21, Transcript of Record.)

At the trial of the case before The Tax Court, in addition to the testimony of the President, M. L. Jacobs, the petitioner introduced evidence of a disinterested, unimpeached and qualified witness that the salaries of the President and the Vice-President were reasonable. Transcript of Record, page 48 through 51.

The Commissioner introduced no controverting testimony.

Notwithstanding this testimony that $12,000.00 was reasonable compensation for each of the officers, The Tax Court found that $4,800.00 and $2,600.00 represented reasonable salaries for the President and Vice-President for the taxable year in question. Notwithstanding The Tax Court's finding as above quoted as to the $30,000.00 contribution to the surplus of the corporation, The Tax Court held that the Petitioner was not entitled to this credit in determining its excess profit tax.

Thus, The Tax Court's decision sustained the presumption in favor of the Commissioner, without supporting evidence.

The Tax Court did, however, allow the Secretary-Treasurer $8400.00 salary rather than the $6,000.00 which the Commissioner allowed and that officer's salary is not involved in the appeal.

On appeal of the case to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, the Honorable Circuit Court of Appeals wrote a very short opinion holding that The Tax Court could disregard the testimony of Petitioner's witness and affirmed The Tax Court. Tr. of Rec. 79-80. The opinion of the Circuit Court of Appeals concludes with this statement:

> "The Tax Court heard the evidence and in *its* opinion carefully review it. *It* was not convinced that there was any error in the Commissioner's findings. The judgment of The Tax Court is affirmed." (Emphasis supplied.)

Petitioner contends:

(1) That the presumption in favor of the Commissioner's determination of the deficiency in taxes is "one of law. It is not an inference of fact and it disappears when evidence sufficient to sustain a contrary finding has been introduced."

(2) That under the decision in the case of DOBSON v. THE COMMISSIONER OF INTERNAL REVENUE, 320 U.S. 489, 88 Lawyer's Ed. 248, decided December 20, 1943, the Honorable Circuit Court should have reviewed this case to find if there was any warrant in the record or basis in law for The Tax Court's holding that $4,800.00 and $2,400.00 represented reasonable salaries for the two executive officers, and

if there was no evidence that such amounts represented reasonable salaries, then the case should have been reversed.

(3) That the scope of review of opinions of The Tax Court has been broadened by the Administrative Procedure Act, passed in 1946—3 years after the DOBSON decision, Chapter 19, Title 5, U.S.C.A., Section 1009 e, page 339, Pocket Parts, under which " * * * it is the duty of the appellate court to review the entire record and to determine whether the facts and conclusions of the Court below are supported by and in accordance with the reliable probative and substantial evidence in the case." LINCOLN ELECTRIC CO. v. COMMISSIONER, 162 Fed. (2d) 379.

These contentions of the petitioner are to determine the scope of review to which a litigant is entitled by the Circuit Court of Appeals on appeal from a judgment of The Tax Court.

II.

OPINION BELOW

The opinion of the Honorable United States Circuit Court of Appeals for the Fifth Circuit is reported in Volume 165, Federal (2d) 991, and appears on pages 79-80, Tr. of Rec.

III.

JURISDICTIONAL STATEMENT

1. The statutory provision relied upon to sustain jurisdiction is Section 240(a) of the JUDICIAL CODE, as amended, 28 U.S.C.A. 347.

2. The opinion of the Circuit Court of Appeals was rendered on January 27, 1948, Tr. of Rec., page 79. The Peti-

tioner filed a petition for rehearing in said Court on *February* 13, 1948, or within the twenty-one (21) days' period allowed for the filing of such petition by Rule 29 of the RULES OF THE UNITED STATES CIRCUIT OF APPEALS FOR THE FIFTH CIRCUIT, Tr. of Rec., pages 83-87. Rehearing was denied by said Court on February 26, 1948. Tr. of Rec., p. 89. This petition for writ of certiorari is filed within three months of the date of the overruling of the petition for rehearing. 28 U.S.C.A. 350.

IV.

QUESTIONS PRESENTED

1. Should the Honorable Circuit Court of Appeals for the Fifth Circuit review the record in the case to determine if there was substantial evidence to support the decision of The Tax Court and reverse the case in the absence of such substantial evidence?

2. Is the presumption in favor of the Commissioner's determination out of the case when uncontroverted evidence sufficient to support a contrary finding is introduced by the Petitioner and should the Court give consideration to such evidence.

3. Should the decision of The Tax Court disallowing certain contributions made by taxpayers to its surplus be reversed where The Tax Court made a finding that such contribution was made and its decision is contrary to its actual finding?

4. Should The Tax Court and the Circuit Court decide a case on competent and uncontroverted testimony of witnesses rather than base a decision on a naked presumption?

5. Where the Commissioner allowed two executive officers

of a corporation $4800.00 and $2,400.00, respectively, as salaries for the taxable year in question, should the Circuit Court, in reviewing the case, reverse the decision where there was no evidence whatsoever in the record that such amount represented reasonable compensation for the services performed by the officers for the corporation?

6. Are the provisions of the Administrative Procedure Act, which became law June 11, 1946, 5 U.S.C.A., Chapter 19, Sec. 1001, et seq., particularly 1009 e, Scope of Review, applicable to the decisions of The Tax Court, and does such Act entitle a litigant to a wider scope of review by the Appellate Court?

7. Should the decision of The Tax Court sustaining a presumption in favor of the Commissioner unsupported by evidence be reversed where substantial evidence is introduced to disprove the Commissioner's determination?

8. Should a decision of The Tax Court disallowing executive officers of a Louisiana corporation certain compensation be reversed where such Tax Court decision is based on the erroneous assumption that the jewelry stores operated by the two executive officers as partners in Texas and the corporation in Louisiana were for all intents and purposes "one business organziation?"

V.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Honorable Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be settled by this Honorable Court. The Honorable Circuit Court of Appeals decided that even though

the Commissioner introduced no evidence on the issue of reasonableness of salaries and the Petitioner introduced uncontroverted and substantial evidence that certain amounts were reasonable, that The Tax Court may disregard petitioner's evidence and affirm the decision of The Tax Court based entirely on the presumption in favor of the Commissioner.

2. The decision of the Honorable Circuit Court of Appeals for the Fifth Circuit is in conflict with the decision of the Honorable Circuit Court of Appeals for the Sixth Circuit in the case of WIGET v. BECKER, 84 Fed. (2d) 706, and the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of LAWRENCE v. COMMISSIONER, 143 Fed. (2d) 456, and the decision of the Honorable Circuit Court of Appeals for the Tenth Circuit in the case of CRUDE OIL CORPORATION v. COMMISSIONER, 1947, 161 Fed. (2d) 809, wherein it is held that "the presumption of correctness of the Commissioner's finding is one of law. It is not an inference of fact. It disappears when evidence sufficient to sustain contrary finding has been introduced."

3. The decision of the Honorable Circuit Court of Appeals in this case in holding that "The Court was not required to accept blindly the testimony of the diamond merchant who, as an expert witness, testified that in his opinion the salaries contended for were reasonable," (Tr. of Rec., p. 80, is contrary to the holding of the Honorable Circuit Court of Appeals for the Sixth Circuit in the case of CAPITOL BARG DRY CLEANING COMPANY v. COMMISSIONER, 131 Fed. (2d) 712, wherein, in discussing the testimony of witnesses as to the reasonableness of corporate officers' salaries, held: "Their testimony was unimpeached and should have been accepted by the Board in a matter in which the Board itself

had no knowledge or experience upon which it could exercise an independent judgment."

4. The Honorable Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision in that the Honorable Circuit Court of Appeals affirmed the decision of The Tax Court without finding in the record any evidence whatsoever that the salaries of $4,800.00 and $2,400.00 allowed by the Commissioner to the President and the Vice-President respectively, were reasonable compensation for the services performed by said two officers.

5. The Honorable Circuit Court of Appeals for the Fifth Circuit has decided an important question of Federal law which has not been, but should be settled by this Court in that the Honorable Circuit Court of Appeals failed to apply the provisions of the ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C.A., Chap. 19, Sec. 1009e, page 339, Pocket Part, to a review of the case, thereby holding that the provisions of said Act are not applicable to the Tax Court because the provisions of said Act required a review of the entire record and substantial evidence to sustain a decision and a review of the entire record would reveal that there was uncontroverted and substantial evidence sustaining the position of the Petitioner, and there was no evidence sustaining the position of the Commissioner.

6. A Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter in that the Sixth Circuit Court of Appeals in the case of LINCOLN ELECTRIC COMPANY v. COMMISSIONER, 162 Fed. (2d) 379, decided on June 5, 1947, held that the Tax Court was among the agencies to which

the Administrative Procedure Act applied, whereas the Seventh Circuit Court of Appeals in the case of ANDERSON v. COMMISSIONER, 164 Fed. (2d) 870, decided December 17, 1947, expressed disagreement with the Sixth Circuit Court of Appeals Lincoln Electric Company case.

VI.

SUPPORTING BRIEF AND ARGUMENT

In determining the amount of its income tax liability, a corporation is permitted to deduct all ordinary and necessary expenses "including a reasonable allowance for salaries or other compensation for personal services actually rendered * * * ". 26 U.S.C.A., INTERNAL REVENUE CODE, Section 23(a)(1).

The Commissioner made a determination that $4,800.00 and $2,600.00 represented such a reasonable allowance for salaries or other compensation for the President and Vice-President of the Petitioner corporation. The Petitioner was not satisfied with this determination, because it had paid said two officers $12,000.00 each per year for the services they performed and the results obtained and therefore filed a petition in The Tax Court to re-determine such issue. The Petitioner made the proof set out on pages 48-63 of the Transcript of the Record and introduced minutes of a meeting at which the three stockholders of the corporation were present and authorized the salaries which the Petitioner deducted. Transcript of Record, pages 70-71.

The Commissioner offered no contradictory evidence.

It has been repeatedly held that where evidence is introduced sufficient to sustain a holding contrary to the Commissioner's determination, the presumption in favor of the Commissioner is out of the case.

Crude Oil Corporation v. Commissioner, 1947, 161 Fed. (2d) 809 (10th Cir.);
Hemphill School, Inc., v. Commissioner (9th Cir.), 137 Fed. (2d) 961, 964;
Wiget v. Becker (8th Cir.), 84 Fed. (2d) 706-8;
Lawrence v. Commissioner (9th Cir.), 143 Fed. (2d) 456-9;
J. M. Perry & Co. v. Commissioner (9th Cir.), 120 Fed. (2d) 123;
E. Albrecht & Son v. Landy (8th Cir.), 114 Fed. (2d) 202, 206;
Andrews v. Commissioner (2nd Cir.), 135 Fed. (2d) 314, 319;
Cory v. Commissioner (3rd Cir.), 126 Fed. (2d) 689, 694;
Webre Steib Company v. Commissioner of Internal Revenue, 324 U.S., pp. 164, 170 and 171, 89 Lawyer's Ed., pp. 819, 826 and 827;
Boggs & Buhl v. Commissioner (3rd Cir.), 34 Fed. (2d) 859.

To affirm The Tax Court's holding that $4,800.00 and $2,600.00 represented reasonable compensation for the services of these two executive officers, there should be found "warrant in the record and a reasonable basis in the law" for such conclusion. The conclusion should not be based on a naked presumpton. This is the requirement of the holding in the case of DOBSON v. COMMISSIONER OF INTERNAL REVENUE, 320 U.S. 489, 88 Law. Ed. 248. "A presumption is not evidence and may not be given weight as evidence." NEW YORK LIFE INSURANCE COMPANY v. GAMER, 303 U.S. 161-171, 82 Law. Ed. 726.

To determine if there is "warrant in the record" and a reasonable "basis in the law" the reviewing court will not sanction The Tax Court's arbitrary disregard of uncontradicted and unimpeached testimony of witnesses. If The

Tax Court could throw out the testimony of witness for petitioner, then it could in every case decide in favor of the Commissioner's determination. The Circuit Court, in affirming The Tax Court, realized that The Tax Court had to diregard the petitioner's testimony in rendering the decision that it did. The Circuit Court states: "The Court was not requred to accept blindly the testimony of the diamond merchant who, as an expert witness, testified that in his opinion the salaries contended for were reasonable." The testimony of the diamond merchant, Transcript of Record, pages 48-51, was to the effect that $12,000.00 to each of the officers was reasonable compensation. He was a qualified witness, unimpeached and uncontroverted. In so ruling out the testimony of this witness, the Circuit Court of Appeals for the Fifth Circuit rendered a decision contrary to the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of CAPITOL-BARG DRY CLEANING COMPANY v. COMMISSIONER, 131 Fed. (2d) 712, wherein that Circuit Court held that The Tax Court could not disregard the testimony of experts on the matter of reasonableness of officers' salaries.

This is not a case where a question of intricate accounting or technical tax practice assumed to be peculiarly and more efficiently known by members of The Tax Court are involved. Petitioner submits that the efforts of the two executive officers in this case resulted in the transformation of a business establishment which apparently had not paid income tax on its operations, to a business establishment which was operating profitably and paying income tax, and that to sustain the Commissioner's determination that the modest amounts of $4,800.00 and $2,600.00 represented reasonable salaries would be a mockery and grave injustice, and certainly unsupported by any evidence in the record.

The action of The Tax Court in disallowing the salaries

paid by the petitioner corporation, is not only based on the naked presumption in favor of the Commissioner, but is also based on the erroneous assumption of The Tax Court that the Louisiana corporation, in which the two executive officers were major stockholders, and the retail jewelry businesses in Texas, which were operated by the two executive officers as partnerships, were one and the same taxpayer. The Tax Court states "to all practical intents and purposes, the Jacobs brothers owned the Alexandria store to the same extent as they did their stores in Beaumont and Port Arthur." Transcript, page 23. The Tax Court states further " * * * Petitioner corporation and the Jacobs brothers are, for all practical purposes, one business organization." Transcript of Record, page 31. Petitioner submits that this basis of The Tax Court decision is an erroneous legal conclusion which was affirmed by the Circuit Court. The very foundation of the Petitioner's liability for the tax is that it is a separate corporation. Were it not so, no corporation income tax, declared value excess profit tax and excess profit tax would be owing by it. To reason that because the two officers were also partners and operated similar partnership businesses, and were therefore not entitled to the compensation which the corporation regarded their services worth to it, does violence to the fundamental statutory authoritization that a corporation may deduct reasonable salaries for the services performed by its officers. The fact that the two officers had the experience gained from many years of operating other retail outlets as partners over a long number of years, would render their services so much more valuable to the corporation.

Likewise, the Court having made a finding that the officers made a contribution of $30,000.00 in merchandise to the surplus of the corporation (Transcript of Record, page 21), its legal conclusion should have been to allow the corporation to use said amount in determining its excess profit tax,

Section 714, 715, 716 and 718, INTERNAL REVENUE CODE See Appendix.

The Petitioner further contends that the review of Tax Court decisions is now controlled by the Administrative Procedure Act, 5 U.S.C.A., Chapter 19, Section 1001, et seq., pages 331-339, 1947 Pocket Part.The DOBSON decision was handed down December 20, 1943. The United States Congress passed the Administrative Procedure Act three years later, or in 1946. It is a fundamental rule of statutory construction that a legislative act must be given effective construction. 59 CORPUS JURIS, page 961.

> "In construing a statute to give effect to the intent or purpose of the legislature, the object of the statute must be kept in mind, and such construction placed upon it as will, if possible, effect its purpose, and render it valid, even though it be somewhat indefinite. To this end it should be given a reasonable or liberal construction; and if susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation of the statute, and even though both are equally reasonable." Innumerable cases cited, 59 CORPUS JURIS 961-964.

The importance of the Administrative Procedure Act was best expressed by Senator Pat McCarran, Chairman, Committee on the Judiciary, United States Senate. In the Legislative History of the Administrative Procedure Act, page 311, 79th Congress, 1944-1946, Second Session, Document No. 248, in presenting this Bill to the Senate, Senator McCarran stated:

> "Let me say to the Senators now present—and I think I can speak for the Committee on the Judiciary—

> that I do not believe a more important piece of legislation has been or will be presented to the Congress of the United States than the one which I am trying in my humble way to explain to the Senate today, because it deals with something which touches the most lowly as well as the most elevated and lofty citizen in the land. It touches every phase and form of human activity, and it deals with that which at the opening of my statement I described as the fourth branch of our democracy. In other words, by the Constitution the executive, the legislature, and the judicial branches of our Government were set up; but now we have a fourth branch, the administrative form of our Government."

In the Foreword to the publication of the Legislative History of the Administrative Procedure Act by the Government Printing Office, Senator McCarran states:

> "The Administrative Procedure Act is a strongly marked, long sought, and widely heralded advance in democratic government. * * * Although it is brief, it is a comprehensive charter of private liberty and a solemn undertaking of official fairness. It is intended as a guide to him who seeks fair play and equal rights under law, as well as to those invested with executive authority. * * * "

The Tax Court is an independent agency in the executive branch of the government. The Internal Revenue Code, when enacted, described the Board in the same way. INTERNAL REVENUE CODE, 26 U.S.C.A., Section 1100.

The Supreme Court, in "OLD COLONY TRUST COMPANY V. COMMISSIONER", 279 U.S. 716, 725, said:

> "The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base

a petition for review to the courts after the administrative inquiry of the board has been had and decided."

The change of the name of the Board of Tax Appeals to The Tax Court and the designation of its members as judges in no way affected the status of the tribunal as an independent agency in the executive branch of the Government. The committee report (H. R. Rept. No. 2333, 77th Congress, 2d Session, pp. 172, 173) explained Section 504 of the Revenue Act of 1942, which effected the changes, said:

> "This section merely changes the names by which the Board of Tax Appeals, its chairman and its members are known. No change is made in its status. The Board, which will hereafter be known as the United States Tax Court, is continued as an independent agency in the executive branch of the Government. Thus its status as an executive or administrative board is unchanged."

The Circuit Court of Appeals for the Fifth Circuit in the case of HUTCHINGS-SEALY NATIONAL BANK v. COMMISSIONER, 141 Fed. (2d) 422, held that The Tax Court, like the Board, was an agency rather than a judicial tribunal. Since The Tax Court is an agency rather than a Court, it follows that it is subject to the Administrative Procedure Act. Section 10-E of that Act, dealing with scope of review, 5 U.S.C.A., Chapter 19, page 339, 1947 Pocket Part, states that an Appellate Court shall set aside agency action, findings, and conclusions found to be "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5)

unsupported by substantial evidence in any case subject to the requirements of Sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court *shall review the whole record* or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." (Emphasis supplied.)

Petitioner invites the Court's review of an article "The Administrative Procedure Act And the Tax Court" by Sydney R. Rubin in the March 1948 issue of "Taxes. The Tax Magazine" a publication of the Commerce Clearing House, pages 255-260, wherein the author advances authoritative and convincing reasons why reviews of Tax Court decisions are now governed by the provisions of the Administrative Procedure Act. 5 U.S.C.A., Chap. 19, page 939, 1947 Pocket Parts.

The Sixth Circuit Court of Appeals reached the conclusion that the Administrative Procedure Act applied to The Tax Court in the case of LINCOLN ELECTRIC COMPANY v. THE COMMISSIONER, 162 Fed. (2d) 379, decided on June 5, 1947. The case involved the deductibility as "ordinary and necessary expenses," of premiums paid upon an employee's retirement annuity policy and payments to a trust for the benefit of employees. The Tax Court decided that the expenditures were not "ordinary and necessary," and the Commissioner argued that this was a factual determination binding on the Circuit Court Court of Appeals under the DOBSON rule. The Circuit Court rejected this argument and reversed the Tax Court, holding that the question before it was one of law which the DOBSON case did not preclude it from reviewing. The Circuit Court went further and held that in view of the Administrative Procedure Act, its power

of review was enlarged and broadened and that the provision of such Act would control its review of Tax Court decisions rather than the DOBSON rule.

In DAWSON v. COMMISSIONER, 163 Fed. (2d) 664, decided September 22, 1947, the same Circuit reaffirmed what it has said in the LINCOLN ELECTRIC COMPANY case with reference to the Administrative Procedure Act.

The Seventh Circuit Court of Appeals in ANDERSON v. COMMISSIONER, decided December 17, 1947, 164 Fed. (2d) 870, expressed disagreement with the Sixth Circuit's LINCOLN ELECTRIC case, but in that case the Seventh Circuit, in affirming The Tax Court, held that the evidence supported The Tax Court's decision under any theory of judicial review and by way of dicta added that it disagreed with the LINCOLN ELECTRIC COMPANY case.

Petitioner contends that the Administrative Procedure Act was passed for the express purpose of requiring Appellate Courts to review the entire record on appeals from administrative bodies, and to reverse those decisions of administrative bodies which are unsupported by substantial evidence. The Tax Court held that $4,800.00 and $2,600.00 represented reasonable compensation for the two officers in question. The Honorable Circuit Court should have examined the entire record to find substantial evidence supporting this holding. The record will not reflect a syllable of evidence supporting the decision of The Tax Court in this respect.

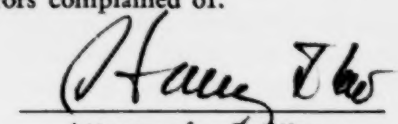
In conclusion, this Petitioner states that the Honorable Circuit Court erred in holding that The Tax Court could disregard the uncontroverted and substantial evidence of the Petitioner and in deciding the case on the naked presumption in favor of the Commissioner's determination without support of evidence, and in such holding violating the requirement in the DODSON case.

Furthermore, the Petitioner submits that on review of this case by the Circuit Court, the Circuit Court should have applied the requirements of the Administrative Procedure Act and sought to find in the record substantial evidence sustaining The Tax Court's decision, in the absence of which the Circuit Court should have reversed the case.

It is quite evident from a review of the legislative history of the Administrative Procedure Act that it was the intention of the United States Congress to change the rule pertaining to the scope of review which appellate courts should give decisions of the administrative bodies. Pages 323, 324, 325.

PRAYER

Therefore, this petitioner prays that an appropriate judgment be entered herein requiring the respondent to restore the disallowed portions of the salaries of the two executive officers of the petitioner corporation, and to restore to petitioner claimed equity invested capital the sum of $30,000.00 for all days between August 15, 1940, and July 31, 1941, or in the alternative petitioner prays that this case be reversed, and for such other orders and decrees as may be required to correct the errors complained of.



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APPENDIX

Statutes and Regulations Involved

INTERNAL REVENUE CODE:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) Expenses.—

(1) Trade or Business Expenses.—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *.

SEC. 714. EXCESS PROFITS CREDIT—BASED ON INVESTED CAPITAL.

The excess profits credit, for any taxable year, computed under this section, shall be the amount shown in the following table:

If the invested capital for the taxable year, determined under Section 715, is:	The credit shall be:
Not over $5,000,000 . . .	8% of the invested capital.

SEC. 715. DEFINITION OF INVESTED CAPITAL.

For the purposes of this subchapter the invested capital for any taxable year shall be the average invested capital for such year, determined under Section 716, * * *.

SEC. 716. AVERAGE INVESTED CAPITAL.

The average invested capital for any taxable year shall be the aggregate of the daily invested capital for each day of

such taxable year, divided by the number of days in such taxable year.

SEC. 718. EQUITY INVESTED CAPITAL.

(a) Definition.—The equity invested capital for any day of any taxable year shall be determined as of the beginning of such day and shall be the sum of the following amounts, reduced as provided in Subsection (b)—

(1) Money Paid In.—Money previously paid in for stock, or as paid-in surplus, or as a contribution to capital;

(2) Property Paid In.—Property (other than money) previously paid in (regardless of the time paid in) for stock, or as paid-in surplus, or as a contribution to capital. * * *